NO. 80-5887

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1980

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SUPREME COURT, U.S.

RICHARD H. WHITE,

Petitioner,

-v-

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Can a court require that an application for attorneys' fees filed under 42 U.S.C. §1988, which authorizes fees "as part of the costs," be filed within the 10 days allowed by Rule 59(e) of the Federal Rules of Civil Procedure for a motion to alter or amend a judgment, (A) in disregard of the plain language of §1988, of this Court's decision in Hutto v. Finney, and of Rule 54(d) which governs the allowance of costs, and (B) in disregard of this Court's decision in Spragne v. Ticonic National Bank holding that a fee application is "not a request for a modification of the original decree," and of Rule 54(b) which allows entry of a final judgment on fewer than all claims?

II. May a court, in imposing a 10-day time limitation on the filing of a fee application, require counsel to negotiate a fee award concurrently with negotiations directed at settling the merits of a case, despite the ethical conflicts that such an obligation imposes on class counsel?

LIST OF THE PARTIES

The petitioner, the plaintiff-appellee below, is RICHARD H. WHITE, a resident of New Hampshire.

The respondents, the defendants-appellants below, are the NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, and its Commissioner, BENJAMIN C. ADAMS.

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REPORTED OPINIONS

The decision of the U.S. Court of Appeals for the First Circuit, entered on August 12, 1980, is reported at 629 F.2d 697 (1st Cir. 1980). A copy of the decision is attached hereto as Appendix A.

The decision of the U.S. District Court for the District of New Hampshire denying respondents' motion to vacate the consent decree, which decision was entered on October 1, 1979, and the decision of the District Court awarding fees to petitioner, entered on August 30, 1979, are both unreported. Copies of the decisions are attached hereto as Appendix B and Appendix C, respectively.

JURISDICTION OF THIS COURT

The judgment of the U.S. Court of Appeals for the First Circuit was entered on August 12, 1980. On November 10, 1980, Justice Brennan signed an order extending the time for filing a Petition for a Writ of Certiorari to and including December 10, 1980. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The federal statute involved in this case is the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 as amended, which provides in pertinent part:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42], Title IX of Public Law 92-318 [Title IX of the Education Amendments of 1972, Sections 1681-1686 of U.S.C. Title 20]...or Title VI of the Civil Rights Act of 1964 [Sections 2000d, et seq., of U.S.C. Title 42], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This case also involves Rules 54(b), 54(d), 58 and 59(e) of the Federal Rules of Civil Procedure, which provide in whole or pertinent part:

Rule 54(b)

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 54(d)

> Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 58

> Entry of Judgment....Entry of the judgment shall not be delayed for the taxing of costs.

Rule 59(e)

> Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

The substantive merits of this case were resolved in a consent decree approved by the trial court on January 26, 1979. The issues presented here arise from the court of appeals' reversal of the trial court's award of attorneys' fees to petitioner's counsel under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 as amended [hereinafter "§1988" or the "Fees Act"].

This action was commenced in March, 1976, when petitioner, represented by counsel from New Hampshire Legal Assistance, filed a complaint alleging that respondents' procedures for processing unemployment compensation claims violated the due process clause of the Fourteenth Amendment and also violated the "when due" provision of the Social Security Act, 42 U.S.C. §503(a)(1). A-2, A-17. Petitioner's complaint was filed under 42 U.S.C. §1983. A-2. Jurisdiction was conferred on the district court by 28 U.S.C. § 1343(3)&(4). Id.

On May 11, 1976, petitioner's action was certified as a class action. Id. Following discovery and after a two-day bench trial in the fall of 1977, the district court entered a judgment on November 15, 1977 in favor of petitioner and his class, holding that respondents' administrative procedures were in violation of the "when due" provision of the Social Security Act. Id.

Respondents' thereafter filed an appeal from the trial court's decision on the merits. Id. While the appeal was pending, counsel for petitioner and his class and counsel for respondents initiated settlement negotiations. Id. In response to a motion filed by respondents in the court of appeals, the case was remanded "for the purpose of entertaining a consent decree." Id. During the negotiations, attempts

were made to settle the matter of fees and even to have petitioner's counsel waive attorneys' fees. A-18. But, as the district court later found, "[t]hese attempts proved nugatory and finally without any mention of attorneys' fees and costs a Consent Decree was filed and approved [by the court] on January 26, 1979." Id.

Immediately following the entry of the consent decree, petitioner's counsel initiated efforts to reach a settlement on the award of attorneys' fees.[1] When the settlement negotiations ultimately proved to be unsuccessful, petitioner's counsel on June 7, 1979 moved for an award of attorneys' fees under 42 U.S.C. §1988. A-3. Respondents' counsel objected, and a hearing was held on August 21, 1979. A-3, A-18. At that hearing, respondents' counsel argued that petitioner was not truly the prevailing party, A-3, and he argued that the hourly rates used by petitioner's counsel in computing the fee request were too high, A-18. He also contended that he had expected that the fee claim would not be pursued. A-3. As summarized later by the court of appeals:

> "In the fees hearing before the district court, the parties presented different versions of talks they had had concerning attorney's fees prior to their approval of the consent decree which, as already mentioned, was silent on the subject. [Petitioner] contended that [he] had expected the fees issue to be resolved through negotiation following the entry of judgment while [respondents] basically represented that [they] had expected that the issue of fees would not be pursued. The district court in its opinion awarding fees concluded that attempts to resolve the fees matter at the time of entry of the consent decree 'proved nugatory.'" A-3 n.2.

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1. The settlement negotiations on the fee award were initiated by petitioner's counsel five days after the entry of the consent decree on the merits. See Itemized Bill in Support of Plaintiffs' Motion for Attorneys Fees at p.8, and see Plaintiffs' Objection to Defendants' Motion to Vacate Consent Decree at p.2, in the Court of Appeals Revised Joint Appendix at p.86 and p.105-c, respectively.

Although respondents' counsel thus argued that he had not expected the fee claim to be pursued after the entry of the consent decree on the merits, he also candidly conceded at the hearing that it would have been unethical to "hold a class action hostage or consent decree hostage for a waiver of attorneys fees."[2]

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2. Although the court of appeals' decision in this case does not reflect counsel's admission, counsel did rather fully discuss the ethical conflicts at two separate hearings in the trial court. These conflicts were first described by respondents' counsel at the fees hearing held on August 29, 1979:

> "[P]art of the problem including the attorneys' fees and the consent decree was that, in a seminar that was held, it seemed to be the concensus of those present [that] you could not hold a class action hostage or consent decree hostage for a waiver of attorneys' fees.
>
> "Now, I haven't seen anything lately on that, but it became my opinion, and I was warned by my brother counsel in my office, I should not be holding the consent action hostage to attorneys' fees because I might have an ethical problem and it should not be included in the consent decree. That was his opinion. He had been through the course. and I took his opinion." August 21, 1979 Fee Hearing Transcript at pp.20-21, in the Court of Appeals Revised Joint Appendix at pp.126-127.

At a subsequent hearing on October 1, 1979 to consider respondents' motion to vacate the consent decree, counsel for the respondents again volunteered to discuss the ethical problem:

> "I would add, Your Honor, again, I may be repeating myself from the last time we were here on the question of attorneys' fees, at that time I felt there was an ethical problem in discussion of the attorneys' fees, at least towards the end when the consent decree was finally signed. [W]hat I have read and what is being held is, if the attorneys' fees are going to a nonprofit corporation, rather than to the plaintiffs, that it's wrong to hold the attorneys' fees hostage to consent decree because the Court's Order goes to the plaintiff. And however the attorneys' fees go to the attorneys directly. [A]nd unlike other cases, if you hold or require an attorney in this situation to forego or withhold attorneys' fees in order for his clients to get what they wanted in the first place, from what I have read there is an ethical problem here. And that's all I want to say." October 1, 1979 Motion Hearing Transcript at pp.2-3, in the Court of Appeals Revised Joint Appendix at pp.135-136.

Thereafter, subsequent to the submissions by counsel and the arguments and admissions at the fee hearing, the district court on August 30, 1979 overruled the objections raised by respondents' counsel to petitioner's fee request, and awarded "[r]easonable attorney's fees in the sum of $16,644,40...to [petitioner's] counsel." A-25.

On September 13, 1979, respondents filed a motion to vacate the consent decree, contending in part that the fee motion by petitioner's counsel had caught respondents "by surprise." A-3. After a hearing at which respondents' counsel again admitted the ethical problems surrounding concurrent negotiations of fees and the merits, see n.2 supra, the court rejected respondents' motion in a one-page order. A-3, A-16. Respondents then perfected their appeals from both the award of fees and from the denial of the motion to vacate, A-3, and the appeals were consolidated, A-4.

On appeal to the First Circuit, respondents argued for the first time that the fee request filed under the Fees Act by petitioner's counsel actually had been a motion to alter or amend judgment, and that it thereby was time-barred by the 10-day limitation in Rule 59(e) of the Federal Rules of Civil Procedure. Id. The First Circuit agreed, and thereby reversed the trial court's fee award. A-1 through A-15.

In order to apply Rule 59(e) to a fee request, the First Circuit had to characterize a fee award as an integral part of a substantive judgment on the merits, whether that substantive judgment was ordered by a court or obtained through a consent decree. By doing so, the First Circuit rendered a dual holding: "We hold that a fees award under 42 U.S.C. §1988 is a matter to be raised and determined prior to entry of final judgment, and that, at the latest, a fees request may be presented after judgment only within such time

limits as apply to an appropriate motion to reopen the judgment. Here the proper post-judgment motion was one to alter or amend judgment under Fed. R. Civ. P. 59(e)." A-4 (emphasis added).

In applying Rule 59(e) to a fee request, the First Circuit rejected petitioner's two arguments that fee requests are not governed by the rule. Responding to petitoner's initial argument, the First Circuit held that a fee award could not be characterized, as it is defined in the Fees Act, "as part of the costs." A-5 through A-11. The First Circuit thereafter held that a fee request is not sufficiently collateral and independent so that it may be considered in an independent proceeding apart from and subsequent to the judgment on the merits. A-12, A-13.

In holding that a fee determination is an integral part of the merits of a lawsuit, the court ruled that, even in cases that are being negotiated, the issue of fees should be negotiated simultaneously with the issues on the merits: "Nor in a consent decree context do we see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations." A-15 (emphasis added). Perceiving no ethical conflicts flowing from this requirement, the First Circuit added that it did not necessarily "suggest that an attorney in the course of settlement negotiations need, or in every case may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree." Id.

Petitioner here requests this Court to issue a writ of certiorari to the U.S. Court of Appeals for the First Circuit, and to summarily reverse the First Circuit's decision or to set this case for plenary review.

REASONS FOR GRANTING THE WRIT

The First Circuit's application of Rule 59(e) to a fee request filed under the Fees Act is in direct conflict with the decisions of this Court, with the decisions of the Fifth, Seventh and Ninth Circuits, and with the exprens language and intent of the Fees Act. Since the Fees Act defines fees as "costs," most courts have held that fee applications are governed by Rule 54(d) not by Rule 59(e). And since this Court has held that a fee application should be determined in an independent proceeding and is not a request for a modification of the original decree, a fee request cannot be governed by Rule 59(e).

The First Circuit's requirement of simultaneous negotiation of the fee issue and issues on the merits imposes severe ethical conflicts on class counsel, and is in direct conflict with decisions of the Third and Ninth Circuits.

The First Circuit's decision also is contrary to sound judicial policy and to the intent of the Fees Act because it discourages the settlement of cases on the merits, discourages settlement of fee awards, delays appeals on the merits, and increases the number of fee applications that will have to be filed during the course of litigation.

I. THE FIRST CIRCUIT'S DECISION, REQUIRING A FEE APPLICATION TO BE FILED AFTER ENTRY OF A JUDGMENT ON THE MERITS NO LATER THAN WITHIN THE 10 DAYS ALLOWED BY RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR MOTIONS TO ALTER OR AMEND JUDGMENTS, IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND WITH THE DECISIONS OF ALL OTHER COURTS OF APPEALS THAT HAVE ADDRESSED THIS ISSUE

The First Circuit's decision in the instant case, applying the 10-day period in Rule 59(e) to a fee request filed under the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988 as amended, is in direct conflict with the decisions of this Court and with the decisions of the courts of appeals.

Most courts of appeals, recognizing that the Fees Act characterizes fees "as part of the costs," see generally Hutto v. Finney, 437 U.S. 678 (1978), have held that fee applications are subject only to Rule 54(d) and are unaffected by the 10-day limit of Rule 59(e). Other courts, adhering to this Court's decision in Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), have held that a fee application presents a collateral and independent claim not a request for modification of a substantive decree on the merits, meaning that a fee application a fortiori is unaffected by Rule 59(e). In the instant case, the First Circuit rejected both of these approaches and instead applied Rule 59(e) to a fee request filed under the Fees Act. The First Circuit is the only court of appeals that has reached this result under the Fees Act.

A. SINCE FEE AWARDS UNDER THE CIVIL RIGHTS ATTORNEYS' FEES ACT ARE TREATED AS PART OF THE "COSTS," FEE APPLICATIONS ARE NOT GOVERNED BY RULE 59(e)

The Fees Act unmistakably states that fees are to be awarded "as part of the costs." 42 U.S.C. §1988, as amended. In Hutto v. Finney, 437 U.S. 679 (1978), where the Court held that this statutory authorization of fees as part of the costs was sufficient to abrogate the Eleventh Amendment immunity claimed by the state defendants, this Court repeatedly referred to the interrelationship between costs and fees noting that Congress of course could "amend its definition of taxable costs," that the Fees Act represented Congress' decision to authorize an award of attorney's fees as an item of costs," and that "there are a large number of statutory and common law situations in which allowable costs include counsel fees." 437 U.S. at 696-697 (footnotes omitted). If fees are to be

treated as part of the costs, as Congress intended them to be, an application for fees cannot be controlled by Rule 59(e).

Both the Fifth Circuit and the Seventh Circuit, relying on the express statutory language of the Fees Act and on this Court's decision in Hutto, have explicitly rejected the application of Rule 59(e) to a request for fees. See Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980), and Bond v. Stanton, Nos. 79-1759, 1799 & 1800 (7th Cir., Sept. 19, 1980), respectively. Another court of appeals, the Fourth Circuit, has declined to apply Rule 59(e) to a request for fees. Fox v. Parker, 626 F.2d 351 (4th Cir. 1980). Of all courts of appeals, only the First Circuit in this case has held Rule 59(e) applicable to a fee request under the Fees Act.[3]

The Fifth Circuit in Knighton fully explored the inapplicability of Rule 59(e) to a fee request under the Fees Act.

> "In this case, attorney's fees are by statute part of the costs. Because they may be awarded only to prevailing parties, and in the discretion of the district court guided by the Johnson factors, attorney's fees under section 1988 will ordinarily be sought only after litigation. Thus, a motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e). Cf. Fed. R. Civ. P. 58 ('[e]ntry of the judgment shall not be delayed for the taxing of costs')." 616 F.2d at 797 (citation omitted).

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3. There is one other court of appeals' decision where Rule 59(e) has been applied to a fee request, but there the request was not made under the Fees Act. Specifically, in Stacy v. Williams, 446 F.2d 1366 (5th Cir. 1971), the Fifth Circuit held that Rule 59(e) was applicable to a fee request made under the bad faith exception to the "American Rule." Stacy, however, was distinguished in Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980), where the Fifth Circuit rejected the application of Rule 59(e) to a fee request made under the Fees Act.

The Fifth Circuit thus concluded that "[b]ecause Congress directed that attorney's fees under section 1988 be treated as costs, there is no jurisdictional time limit on the filing of a motion seeking such fees." 616 F.2d at 798.

Thereafter, the Seventh Circuit in Bond fully agreed with the Fifth Circuit's decision in Knighton, and thus explicitly rejected defendants' Rule 59(e) argument. Slip Opinion at 5.

Reaching a similar conclusion but in a different manner, the Fourth Circuit in Fox rejected defendant's Rule 59(e) argument on the grounds that the argument could not be raised for the first time on appeal.[4] 626 F.2d at 352-353.

Contrary to the express language of the Fees Act, contrary to this Court's decision in Hutto, and contrary to the courts of appeals' decisions in Knighton, Bond and Fox, the First Circuit here held that fees should not be treated as part of costs, and that a request for fees is better characterized as a motion to alter or amend a judgment which is governed by Rule 59(e). Sufficient to overcome the language of the Fees Act and controlling precedent, in the First Circuit's view, were three factual differences between fees and other items of costs: (1) in order to calculate an award of fees, a "district court must evaluate possibly a dozen diverse factors," (2) in awarding fees, "the district court is generally assisted by submissions from the parties and frequently finds it necessary, as was true here, to hold a hearing on the matter;" and (3) subsequent to an award of

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4. The Rule 59(e) argument in this case also was raised for the first time on appeal. Disagreeing with the later reasoning of the Fourth Circuit in Fox v. Parker, 626 F.2d 351 (4th Cir. 1980), the First Circuit here held that Rule 59(e) was jurisdictional and that the argument thus could be raised for the first time on appeal. A-4 & A-5.

fees, "[a]ppeals often ensue -- leading to the prospect of separate fee appeals." A-10, A-11.[5] These factual differences, however, do not provide legal grounds for reading Congress' chosen language that fees shall be awarded "as part of the costs" out of the Fees Act. Nor do they explain why, as a matter of law, a fee request should be governed by Rule 59(e).[6]

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5. The First Circuit also argued, A-9, A-10, that fees should not be treated as part of the costs because fees are awarded by courts whereas most costs "may be taxed by the clerk" under Rule 54(d). But aside from the fact that the word "may" in Rule 54(d) is discretionary not mandatory; aside from the fact that 28 U.S.C. §1920, which itemizes statutory costs, authorizes the allowance of costs by either a "judge or clerk;" and aside from the fact that one set of costs itemized in §1920, the compensation of interpreters and court-appointed experts, etc., is "peculiarly within the court's own authority," A-10; the fact of the matter is that Rule 54(d) and §1920 must be read in conjunction with Congress' chosen language in the Fees Act which authorizes "the court," not a clerk, to award "a reasonable attorney's fee as part of the costs," 42 U.S.C. §1988. As this Court has already pointed out, it was "Congress' decision to authorize an award of attorneys fees as an item of costs." Hutto v. Finney, 437 U.S. 678, 697 (1978).

6. The first two factual differences noted by the First Circuit -- the many factors to be considered in computing fees, and the availability of a hearing -- do not support the application of Rule 59(e), but do support the conclusion that a fee request presents a collateral and independent claim. See pp. 13 - 16, infra.

The third difference -- the possibility of separate appeals -- as well as the First Circuit's suggestion that it will "often be more economical of a court's time to resolve fees requests prior to entry of a final judgment," A-13 & A-14, similarly do not support the application of Rule 59(e) to a fee request. To the contrary, the First Circuit's rule is entirely uneconomical particularly in its effect on trial courts. First, as this Court recognized in Bradley v. School Board of City of Richmond, 416 U.S. 696, 723 (1974), in many civil rights cases "many final orders may issue in the course of the litigation." Under the First Circuit's rule, separate fee requests will now have to be filed after each of the many final orders. Second, the short 10-day period under Rule 59(e) substantially diminishes the possibility of post-judgment fee settlements since all fee requests in order to be timely will have to be filed with the courts immediately. Indeed, for the reasons discussed at pp. 23-25, infra., the First Circuit's rule will cause fewer cases to be settled on the merits and force more cases to trial.

The First Circuit's worry about piecemeal appeals is better answered by the approach adopted by the Seventh Circuit in Terket v. Lund, 623 F.2d 29 (7th Cir. 1980). There the Seventh Circuit held that "district courts in this circuit should proceed with attorneys' fees motions, even after an appeal is filed, as expeditiously as possible. Any party dissatisfied with the court's ruling may then file an appeal and apply to this court for consolidation with the pending appeal of the merits." 623 F.2d at 34 (footnote omitted). In fact, under Rule 3(b) of the Federal Rules of Appellate Procedure, "[a]ppeals may be consolidated by order of the court of appeals upon its motion."

In sum, the First Circuit's decision is in conflict with the decisions of other courts of appeals, with this Court's decision in Hutto, and with the explicit language of the Fees Act, and also is erroneous as a matter of law.

B. SINCE FEE APPLICATIONS INVOLVE COLLATERAL AND INDEPENDENT PROCEEDINGS AND NOT A REQUEST FOR A MODIFICATION OF A JUDGMENT ON THE MERITS, FEE APPLICATIONS ARE NOT GOVERNED BY RULE 59(e)

In Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), this Court rejected a timeliness claim identical to that adopted by the First Circuit in this case. At issue in Sprague was the appropriateness of a fee award made pursuant to a fee application which had been filed several years after entry of a judgment on the merits of the case. In the defendant's view, the application was untimely under the then-applicable rules of equity which allowed a final decree to be amended only by a motion filed during the term of court of its entry. Rejecting this argument, and reversing the First Circuit, this Court squarely held that a fee application is not a request for modification of a substantive decree on the merits:

> "Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals--that it came after the end of the term at which the main decree was entered and therefore too late--falls." 307 U.S. at 170.

Although the Court reached this decision under the then-existing rules of equity, the decision would have been the same under Rule 59(e), for, as the Court noted, the timeliness rules pertaining to terms of court under the rules of equity had been replaced by similar timeliness require-

ments in Rules 59 and 60 of the new Federal Rules of Civil Procedure. 307 U.S. at 169 n. 9. Under either set of rules, as Justice Frankfurter concluded in his opinion for the Court, a fee application is not a motion to alter or amend a judgment for the simple reason that "'the inquiry [is] a collateral one, having a distinct and independent character.'" 307 U.S. at 169 (footnote and citation omitted).

The collateral and independent nature of a fee determination is vividly illustrated by the many factors and standards which must be considered separate and apart from the merits in determining an award of fees. As the legislative history of the Fees Act states:

> "The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F. R.D. 680 (N.D.Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D.Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975)." S.Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976).

Consistent with this legislative history, the lower courts routinely apply the twelve separate factors set forth in Johnson for determining fee awards through the "lodestar" method of fee computation, the method used in Stanford Daily and Davis.[7] This process is often "a matter of some

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7. The lodestar method of fee computation is regularly used by most district courts and has long been required by the Second and Third Circuits. See Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). More recently, the lodestar method has been formally adopted by the Fifth Circuit, Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980), and by the District of Columbia Circuit, Copeland v. Marshall, No. 77-1351 (D.C.Cir., Sept. 2, 1980) (en banc).

complexity" which ordinarily involves "the taking of evidence and briefing." Bradley v. School Board of City of Richmond, 416 U.S. 696, 723 (1974). See also Perkins v. Standard Oil Co. of Califronia, 399 U.S. 222, 223 (1970), holding that appellate fees should be awarded by trial courts "after hearing evidence as to the nature and extent of the services rendered."

In view of this Court's decision in Sprague and of the separate and distinct factors that must be considered in determining fee awards, many courts of appeals have characterized fee requests as collateral and independent claims. For example, in Terket v. Lund, 623 F.2d 29, 33-34 (7th Cir. 1980), the Seventh Circuit recognized that a fee determination requires "an examination of factors beyond the issues decided with the merits of the suit," and accordingly held that a fee determination "is not the sort of reconsideration of the merits which could lead to altering the substantive judgment. . . . The district court merely takes the merits into account, along with many other factors, in making a discretionary decision entirely distinct from the underlying judgment." See also Williams v. Alioto, 625 F.2d 845, 848 (9th Cir. 1980): "Claims for attorneys' fees ancillary to the case survive independently under the court's equitable jurisdiction, and may be heard even though the underlying case has become moot."[8]

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8. In cases that become moot, judgments on the merits ordinarily are entered in favor of defendants and the cases are dismissed. But the form of an underlying final judgment against a plaintiff does not control an award of fees under the Fees Act. Instead, a plaintiff who suffers an adverse judgment is entitled to fees where the defendants' action in mooting the case provided some of the relief sought by the plaintiff. See, e.g., Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980); Robinson v. Kimbrough, 620 F.2d 468 (5th Cir. 1980); Oldham v. Ehrlich, 617 F.2d 163 (8th Cir. 1980); Northcross v. Board of Education of Memphis, 611 F.2d 624 (6th Cir. 1979); Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979); International Society for Krishna Consciousness, Inc. v. Anderson, 569 F.2d 1027 (8th Cir. 1977); Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C.Cir. 1977). In fact, plaintiffs can recover fees even if they voluntarily dismiss a case after defendants moot it by providing some of the relief requested. Williams v. Anderson, 620 F.2d 199 (8th Cir. 1980). In other words, a fee request is entirely separate and independent from the form and substance of an underlying judgment on the merits.

The collateral and independent nature of fee awards has been recognized most frequently in the context of their appealability. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1947); Trustees v. Greenough, 105 U.S. 527 (1882); see also the cases cited in Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131 (6th Cir. 1980). Their independent status has also been recognized in other contexts. For example, this Court held last Term that a fee-shifting statute alone can be sufficient to "authorize a federal-court action [solely] to recover an award of attorney's fees." New York Gaslight Club, Inc. v. Carey, 64 L.Ed.2d 723, 738 (1980).[9] In view of these decisions, there can be no doubt about the correctness of Justice Frankfurter's conclusion for the Court in Sprague v. Ticonic National Bank, 307 U.S. 161, 169, 170 (1939), that a fee application has "a distinct and independent character" and is "not a request for a modification of the original decree."

Contrary to this authority, the First Circuit rejected petitioner's argument that the fee request presented a collateral and independent claim, basing its decision on the grounds that the Fees Act authorizes fee awards not to counsel for the prevailing party, but to the "prevailing party," and on the grounds that counsel asserted not "a right of his own [but] one of his client." A-12. The First Circuit reached this conclusion despite the fact that petitioner was represented without fee by counsel for New Hampshire Legal Assistance, A-17, and despite the fact that the trial court had awarded the fees "to [petitioner's] counsel," A-25, (emphasis added).

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9. Although the Court's decision in New York Gaslight Club was based on the fee authorization in Title VII, the same result presumably would obtain under the Fees Act. As the Court there observed, the Fees Act "is legislation similar in purpose and design to Title VII's fee provision." 64 L.Ed.2d at 738 n.9.

Among the errors in the First Circuit's conclusion is the reality--illustrated by the facts here--that public interest lawyers, who often represent their clients without a fee, in fact are asserting their own rights or the rights of their supporting public interest organizations to an award of reasonable fees. Indeed, as the courts have recognized time and again, fee awards are not intended to provide windfalls to prevailing parties but instead are to be paid directly to the attorneys or their supporting organizations. See, e.g., Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 (5th Cir. 1970), where the Fifth Circuit directed "that the fees allowed are to reimburse and compensate for legal services rendered and will not go to the litigants, named or class." The fact that fee awards in public interest litigation are actually to be paid directly to the attorneys or their public interest organizations has also been repeatedly recognized by this Court;[10] it indeed has been recognized by the

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10. See generally, Maher v. Gagne, 65 L.Ed.2d 653, 659 (1980) where fees were awarded to "respondent's counsel," the Legal Aid Society of Hartford County; New York Gaslight Club, Inc. v. Carey, 64 L.Ed.2d 723, 738 n.9 (1980), where fees were held appropriate across-the-board for "public interest groups," including ofcourse the organization that supplied counsel in that case, the NAACP; Hutto v. Finney, 437 U.S. 678, 693 (1978), where appellate fees were ordered to be paid "to counsel for the prevailing parties."

First Circuit itself;[11] and it is fully supported by the legislative history of the Fees Act.[12]

In sum, not only is the First Circuit's decision in conflict with the decisions of other courts of appeals and with this Court's decision in Sprague, but the premise for the First Circuit's result is erroneous as a matter of law.

II. THE FIRST CIRCUIT'S DECISION, REQUIRING AWARDS OF ATTORNEYS' FEES TO BE NEGOTIATED CONCURRENTLY WITH THE NEGOTIATION OF A CONSENT DECREE RESOLVING THE MERITS OF A CLASS ACTION LAWSUIT, IMPOSES ETHICAL CONFLICTS ON CLASS COUNSEL AND IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

Because the First Circuit viewed an award of fees as a necessary part of a final judgment on the merits rather than as part of the costs to be determined in a collateral and independent proceeding, it held "that a fees award under 42 U.S.C. §1988 is a matter to be raised and determined prior to the entry of a final judgment." A-4. Since many final judgments are negotiated consent decrees, the First Circuit's decision requires fees to be negotiated concurrently with the

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11. In earlier decisions, the First Circuit consistently recognized that fee awards are to be paid directly to counsel or to their public interest organizations. See, e.g., Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir. 1980) (ACLU's National Prison Project); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978) (Rhode Island Legal Services); Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978) (Puerto Rico Legal Services); Reynolds v. Coomey, 567 F.2d 1166 (1st Cir. 1978) (NAACP Legal Defense Fund).

12. In enacting the Fees Act, Congress was fully aware that fee awards would be paid to the lawyers themselves or to their supporting organizations. The Senate Report, for example, explicitly states that "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee paying client, 'for all time reasonably expended on a matter.'" S. Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976) (emphasis added) (citation omitted). In fact, the need for the Fees Act was premised on "evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 3 (1976). Designed to remedy this problem by providing a financial incentive to lawyers, the Fees Act was enacted to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." Id. at 9.

negotiation of a decree resolving the merits of a class action lawsuit. This obligation of simultaneous negotiation was made explicit by the First Circuit: not even "in a consent decree context do we see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations." A-15 (emphasis added).

What the First Circuit was unable to see as wrong are the very real ethical conflicts that such a rule imposes upon counsel, especially class counsel.[13] These conflicts, not perceived by the First Circuit, were admitted voluntarily and at length by respondents' counsel -- defense counsel -- in two hearings when this case was before the trial court. See n.2, supra. They also were aptly described in Regalado v. Johnson, 79 F.R.D. 447 (N.D.Ill. 1978):

> "Everyone familiar with civil rights litigation knows that a plaintiff in such suits rarely pays attorney's fees or the costs of litigation. For these reasons, a motion for fees and costs in such a case, although made in the name of the plaintiff, is really one by the attorney. This interest in the fee makes it improper for the lawyer in a civil rights suit to inject the question of attorney's fees into the balance of settlement discussions." 79 F.R.D. at 451.

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13. The First Circuit's rule imposes ethical conflicts on both nonclass counsel and class counsel. The conflict imposed on class counsel is greater, for even without regard to fees, defense counsel sometimes offer full relief to the parties in exchange for no relief for the class. This case, as noted earlier, was certified as a class action. A-2.

In view of these conflicts, two courts of appeals, the Third and Ninth Circuits, have now adopted rules strongly discouraging the simultaneous negotiation of a substantive judgment on the merits and of the availability or amount of fees. The Third Circuit's view is set forth in Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977), where the court urged avoidance of such ethical conflicts by directing "trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees." The Ninth Circuit, in Mendoza v. United States, 623 F.2d 1338, 1352-1353 (9th Cir. 1980), agreed, initially observing that the conflicts do not disappear where "there is no fund or money damages being negotiated. Financial consequences of injunctive relief are a significant consideration to the institution negotiating a remedy, and the potential conflict between class counsel and members of the class remains." As the Ninth Circuit concluded, "we strongly discourage the simultaneous negotiation of attorneys fees and substantive issues in class action settlement negotiations." 623 F.2d at 1353.

The First Circuit's contrary decision here, it needs to be emphasized, does not simply allow simultaneous negotiation. It requires simultaneous negotiation, and thereby imposes on class counsel unconscionable ethical conflicts -- conflicts that are admitted on the record in this case. See n.2, supra.

By requiring simultaneous negotiation, the First Circuit's decision not only is diametrically opposed to the Third Circuit's decision in Prandini and the Ninth Circuit's

decision in Mendoza, but also is inconsistent with prior decisions of this Court holding that fee issues are properly addressed by the parties and by the courts separate from and subsequent to any consideration of the merits. Last Term, for example, in Maher v. Gagne, 65 L.Ed.2d 653 (1980), this Court upheld a fee award which had been entered under the Fees Act subsequent to a negotiated settlement on the merits of the case. Relying on the legislative history of the Fees Act, this Court held:

> "The fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of §1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' S. Rep. No. 94-1011, p.5 (1976)." 65 L.Ed.2d at 661.[14]

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14. In addition to the Senate Report -- relied on by the Court in Maher -- the House Report accompanying the Fees Act also intended that fee awards be addressed after a negotiated resolution of the merits:

> "The phrase 'prevailing party' is not intended to be limited to the victor after entry of a final judgment following a full trial on the merits.... If the litigation terminates by consent decree, or example, it would be proper to award counsel fees. Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974) [aff'g 376 F.Supp. 483 (N.D.Ohio 1973)]; Parker v. Matthews, 411 F.Supp. 1059 (D.D.C. 1976) [aff'd sub nom., Parker v. Califano, 561 F.2d 320 (D.C.Cir. 1977)]; Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975). A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976).

[footnote continued on next page]

This same procedure of addressing fees separate from and only after consideration of the merits has also been held to be the recommended course for trial courts. In Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), where the Court initially noted that "the resolution of the fee issue may be a matter of some complexity and require, as here, the taking of evidence and briefing," this Court held that it would have been wrong for the trial court to have "delay[ed] the implementation of a desegregation plan in order to resolve the question of fees simultaneously. The District Court properly chose not to address itself to the question of the award until after it had approved the non-interim plan for achievement of the unitary school system." 416 U.S. at 723.

The First Circuit's decision here, which treats fees as a necessary ingredient of a final order and which requires simultaneous negotiation of issues on the merits and of fee awards, imposes severe ethical conflicts on all counsel, expecially class counsel. The decision is inconsistent with the decisions of this Court and with the intent of Congress, and is in direct conflict with the decisions of the Third and Ninth Circuits.

[footnote continued from previous page]

The consent decrees in two of the cases relied on in the House Report, similar to the consent decree here, addressed and resolved the merits of the litigation without any reference to attorneys fees. Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974), aff'g 376 F.Supp. 483 (N.D.Ohio 1973); ASPIRA of New York, Inc. v. Board of Education of the City of New York,65 F.R.D. 541 (S.D.N.Y. 1975). The consent decree in the third case reserved the fee issue for later resolution by the court. Parker v. Califano, 411 F. Supp. 1059 (D.D.C. 1976).

III. THE FIRST CIRCUIT'S DECISION IS CONTRARY TO SOUND JUDICIAL POLICY AND CONTRARY TO THE LEGISLATIVE INTENT OF THE CIVIL RIGHTS ATTORNEYS FEES AWARDS ACT BECAUSE THE DECISION DISCOURAGES SETTLEMENT OF CASES ON THE MERITS, DISCOURAGES SETTLEMENT OF FEE AWARDS, DELAYS APPEALS ON THE MERITS, AND INCREASES THE NUMBER OF FEE APPLICATIONS THAT WILL HAVE TO BE FILED

The First Circuit's decision virtually assures fewer settlements and increased docket congestion. Rather than being settled on the merits, cases will be forced to trial and decision. And rather than allowing time for fee settlements after the entry of judgment, the First Circuit's decision requires fee applications to be filed immediately for resolution by the courts.

The impact of the First Circuit's decision on substantive negotiations is a real one. "Negotiation," as the Ninth Circuit has pointed out, "is necessarily a give and take process, and all active elements are weighted in the balance." Mendoza v. United States, 623 F.2d 1338, 1352 (9th Cir. 1980). Accordingly, with fees required to be negotiated at the same time as the merits of a case, class counsel often will be asked by their adversaries to accept less for their clients or less for themselves. Acceptance of the former is unethical.[15] Acceptance of the latter is

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15. The mere possibility of a sweetheart settlement -- "[w]e cannot indiscriminately assume, without more, that the amount of fees have [sic] no influence on the ultimate settlement obtained for the class when, along with the substantive remedy issues, it is an active element of negotiation" -- led the Ninth Circuit to conclude, as noted earlier, that it "would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place." Mendoza v. United States, 623 F.2d 1338, 1352-1353 (9th Cir. 1980).

both unrealistic and contrary to the express purposes of the Fees Act.[16] The obvious result is that cases which could be settled will instead go to trial.

The First Circuit's decision also removes from the negotiation tables most post-judgment fee requests. Because of the First Circuit's application of Rule 59(e) to post-judgment fee requests, counsel for the prevailing parties will have to prepare and file within 10 days: a fee application, time records and affidavits in support thereof, affidavits addressing counsel's hourly rates as well as the various contingency factors and quality factors relevant to fee computation, and a supporting brief.[17] No time can be lost

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16. The First Circuit's suggestion that class counsel can always assist settlement if they "decide to waive fees altogether," A-15, is directly contrary to Congress' intent in enacting the Fees Act. Not only did Congress state that it was "proper to award counsel fees" where the substantive litigation "terminates by consent decree," and that counsel "should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion," H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976), but the express purpose of the Act is to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." Id. at 9. Without the prospect of reasonable fee awards, lawyers will decline to represent those whose rights have been violated. This would then reflect the situation that Congress described at the time it enacted the Fees Act:

> "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Fees Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." Id. at 1.

By inviting class counsel to waive their fees, by encouraging their adversaries to negotiate a fee waiver in return for relief for the class, and indeed simply by requiring simultaneous negotiation of fees and the merits, the First Circuit has negated the very purpose of the Fees Act.

17. The First Circuit requires extensive documentation in support of a fee application. See Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977); King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), cert. denied, 438 U.S. 916 (1978). These requirements cannot be taken lightly, for the burden is on the movant lawyers to prove entitlement to a fee award. Id.; see also, Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978).

attempting to negotiate a settlement concerning the availability or amount of fees. Instead, all fee requests within the jurisdiction of the First Circuit must be filed with the courts. And once the applications have been submitted, with the positions of the parties having hardened, most applications of necessity will have to be resolved by the courts.

In addition to its effect of discouraging settlements, the First Circuit's decision will play havoc with appellate procedures as well as actually increase the number of fee applications that will be filed. Since there now can be no final orders issued by trial courts in the First Circuit until fee awards are resolved, both injunctive relief and appeals on the merits will often be delayed. The former is contrary to this Court's decision in Bradley v. School Board of City of Richmond, 416 U.S. 696, 723 (1974), which held that it would be "undesirable to delay" the implementation of injunctive relief "in order to resolve the question of fees simultaneously." The latter is contrary to the allowance and resolution of appeals on the merits -- which sometimes result in a reversal on the merits -- before fee applications are even filed. See generally Perkins v. Standard Oil Co. of California, 399 U.S. 222 (1970); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). Moreover, since "many final orders may issue in the course of the litigation," Bradley v. School Board of City of Richmond, 416 U.S. 696, 723 (1974), parties who prevail in the First Circuit's trial courts will have to file separate fee applications within 10 days of every such final order rather than await the conclusion of the entire litigation.

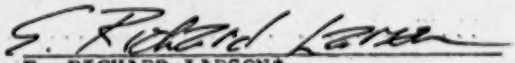
In short, the First Circuit's decision in this case runs contrary to the dictates of sound judicial policy. It also is erroneous as a matter of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the decision of the First Circuit should be summarily reversed. Alternatively, the petition should be granted, and the case set for plenary review.

Dated: New York, New York
December 10, 1980

Respectively submitted,



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United States Court of Appeals
For the First Circuit

No. 79-1536

RICHARD H. WHITE,

PLAINTIFF, APPELLEE,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. MARTIN F. LOUGHLIN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Michael M. Black, with whom *Edward F. Smith* was on brief, for appellant.

Raymond J. Kelly, with whom *Alan Cronheim* was on brief, for appellees.

August 12, 1980

CAMPBELL, *Circuit Judge*. New Hampshire Department of Employment Security (NHDES) appeals from the district court's allowance of plaintiff's post-judgment request for attorney's fees and the court's denial of NHDES' subsequent motion to vacate a previously entered consent decree. As we find the fees request to have been filed too late, we reverse the award.

On March 8, 1976 the plaintiff, Richard M. White, commenced a class action in the United States District Court for the District of New Hampshire challenging NHDES' unemployment compensation procedures. White alleged that delays in the administration of New Hampshire's unemployment compensation program affecting certain groups of

APPENDIX "A"

applicants worked a denial of due process and as well were violative of the so-called "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1).[1] The complaint alleged jurisdiction under 28 U.S.C. §§ 1343(3), (4) and 42 U.S.C. § 1983; requested class certification under Fed. R. Civ. P. 23; and sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202 and Fed. R. Civ. P. 57. The complaint did not include any request for attorney's fees.

Class certification was obtained on May 11, 1976, with the case proceeding to trial on October 12, 1977. The district court found that NHDES' scheme of administration did indeed violate the "when due" provision of the Social Security Act; the court ordered relief and judgment was entered November 15, 1977. Neither the court's opinion and order nor the judgment made any reference to a possible award of attorney's fees. The judgment was subsequently amended in respects not pertinent to the present appeal, and NHDES, on December 27, 1977, filed a timely notice of appeal.

While its appeal was pending in this court, NHDES requested and received numerous extensions of time for the filing of briefs and designation of an appendix on the ground that the parties were attempting to negotiate a settlement. Finally, on December 11, 1978, upon motion of NHDES, this court ordered the "cause...remanded to the district court for the purpose of entertaining a consent decree." The consent decree was approved by the district court on January 26, 1979, with judgment entered on that day. Neither the consent decree nor the judgment contained mention of attorney's fees. The district court returned, after request, the appeal bond on February 28, 1979; the various exhibits apparently also were returned on or near that date.

[1] The complaint also raised a pendent state claim alleging violations of R.S.A. 282:5-B(2)(d) which regulates certain aspects of New Hampshire unemployment compensation eligibility determination procedures.

On June 7, 1979, some four and one-half months after the district court's approval of the consent decree and its entry of judgment, plaintiffs moved for an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. NHDES objected to this motion contending: 1) that plaintiffs had, during the "original discussions...concerning settlement," indicated that attorney's fees would be waived;[2] 2) that plaintiffs had waited "too long to request attorney's fees...;" 3) that an award of fees would be counterproductive as it would penalize the state despite its good faith settlement efforts; and 4) that plaintiffs were not, under the terms of the consent decree, truly the "prevailing party."

A hearing on the fee request was held, and on August 30, 1979 the district court entered an order granting a fee award in an amount in excess of $16,000. Shortly thereafter, on September 13, 1979, NHDES, over ojection, moved to vacate the consent decree contending that "Plaintiff's Motion for Attorney's Fees which was filed almost six months after the entry of the Consent Decree caught [NHDES] by surprise, as prior to this time, [NHDES] had no notice that attorney's fees would be requested and certainly had no notice at all as to the amount of attorney's fees that would be requested." The district court, after hearing, in a terse order of October 1, 1979, denied the motion to vacate. NHDES had previously filed on September 28, 1979 a notice of appeal of the district court's award of fees, and on October 30, 1979 it filed a similar

[2] In the fees hearing before the district court, the parties presented different versions of talks they had had concerning attorney's fees prior to their approval of the consent decree which, as already mentioned, was silent on the subject. Plaintiffs contended that they had expected the fees issue to be resolved through negotiation following the entry of judgment while NHDES basically represented that it had expected that the issue of fees would not be pursued. The district court in its opinion awarding fees concluded that attempts to resolve the fees matter at the time of entry of the consent decree "proved nugatory."

notice concerning the court's adverse ruling on its motion to vacate. The appeals were consolidated by this court's order of November 6, 1979.

I.

We dispose of this appeal focusing solely on the question of the timeliness of plaintiff's motion for fees. As we set aside the award because the request was untimely, we do not consider NHDES' alternative contention that, in light of the unexpected award, it should be allowed to withdraw its consent and that the judgment entered pursuant to such consent should therefore be vacated. We hold that a fees award under 42 U.S.C. § 1988 is a matter to be raised and determined prior to entry of final judgment, and that, at the latest, a fees request may be presented after judgment only within such time limits as apply to an appropriate motion to reopen the judgment. Here the proper post-judgment motion was one to alter or amend judgment under Fed. R. Civ. P. 59(e); such a motion must, however, be served within 10 days after entry of judgment.[3] Since the present fees request was filed long after expiration of the 10 day period, and since Fed. R. Civ. P. 6(b) prohibits a court from extending the 10 day period, the lower court was without authority to entertain plaintiff's fees request.

Before proceeding to amplify these views we briefly consider plaintiff's threshold argument that since NHDES did not specifically raise the Rule 59(e) argument in the lower court, it is precluded from doing so now. *See Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979). The short answer to this objection is that Rule 6(b)'s proscription against the enlargement of the time for serving motions under Rule 59(e) is "mandatory and jurisdictional." *Lapiczak* v. *Zaist*, 451 F.2d

[3] Rule 59(e) provides in its entirety
"Motion to Alter or Amend a Judgment. A Motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

79, 80 (2d Cir. 1971); *see United States* v. *Robinson*, 361 U.S. 220, 229 (1960). Since we hold that a section 1988 fees motion must be made in time to be incorporated in the final judgment, the 10 day period prescribed by Rule 59(e) was in these circumstances the movant's last shot at achieving this result. The district court was thus without jurisdiction over the later application, and the matter of that lack of jurisdiction properly may be first raised at any stage of the proceedings, including the present appeal. *See, e.g.*, Fed. R. Civ. P. 12(b)(3).

II.

Coming to the merits of the timeliness question, our view of the procedural rules applicable to a section 1988 fees request is essentially that set out by Judge Warriner of the Eastern District of Virginia in a comprehensive opinion in *Hirschkop* v. *Snead*, 475 F. Supp. 59 (E.D. Va. 1979). Judge Warriner concluded that "the weight of authority favors the proposition that a motion for attorney's fees under § 1988 must be made within 10 days of entry of final judgment under Rule 59(e)." 475 F. Supp. at 62. The court, in the course of concluding that a final judgment had in fact been entered, rejected the argument that section 1988 fees should be treated as an item of costs governed by Fed. R. Civ. P. 54 and 58, which permit the taxing of costs, without express limit of time, after entry of judgment. The court also rejected the alternative argument that section 1988 fees were somehow so "collateral" to the main litigation as to be eligible for treatment in isolation from the judgment therein.

When the present fees award was appealed, no circuit court had yet spoken on the timeliness issue considered in *Hirschkop*, although there existed a fair amount of circuit and district court authority on the timeliness of motions for attorney's fees made in contexts other than section 1988.[4] Most, though not

[4] *E.g.*, *Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363 (E.D.N.Y. 1978) (in action for disability pension benefits, Fed. R. Civ. P. 59(e)'s ten-day time limitation bars successful plaintiff's request for attorney's fees filed more than 30 days after the entry of

all, of this authority pointed in the direction taken by the district court in *Hirschkop*. The first decision by a circuit court discussing the timeliness of a section 1988 fee request was handed down soon after appellate argument in the present case; this was the Fifth Circuit's decision in *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980), holding, contrary to *Hirschkop*, that attorney's fees under section 1988 were "costs" within Fed. R. Civ. P. 54(b) and 58. As Rule 58 specifically provides that "Entry of judgment shall not be delayed for the taxing of costs," and neither Rule 54(b) nor 58 purports to prescribe any period after judgment within which costs ap-

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judgment) (aff'd on other grounds, although timeliness issue discussed without resolution, 589 F.2d 112 (2d Cir. 1978); *Stacy* v. *Williams*, 50 F.R.D. 52 (N.D. Miss. 1970) (Rule 59(e)'s ten-day limitation bars request for attorney's fees filed more than two months after entry of final judgment; court concluded that it was bound to apply Rule 59 as the fee request concerned "the granting of new substantive relief") (aff'd on the basis of Rule 59(e), 446 F.2d 1366 (5th Cir. 1971)); *DuBuit* v. *Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976) (in patent case, "issue of attorney's fees should have been considered and disposed of either prior to or at the time of the entry of final judgment...and not left open pending the outcome of the appeal."); *Hill* v. *TVA*, 84 F.R.D. 226 (E.D. Tenn. 1979) (in action under Endangered Species Act, request for attorney's fees filed some 28 months after the entry of court's "final order" was barred by Rule 59(e)'s ten-day limitation or alternatively by Rule 60(b)'s one-year limitation on motions for relief from judgment); *Laufenberg, Inc.* v. *Goldblatt Bros.*, 187 F.2d 823 (7th Cir. 1951) (interpreting statute governing award of attorney's fees in patent infringement case to mean "that if an award...is to be made...the [trial] judge should do so either at the time of the entry of judgment or specifically reserve jurisdiction in such judgment to do so. ..."). *Compare Lichtenstein* v. *Lichtenstein*, 53 F.R.D. 533 (E.D. Pa. 1972) (although acknowledging that Rule 59(e) would bar a motion to amend the judgment to include attorney's fees filed after the Rule's ten-day period had expired, the court instead termed plaintiff's request as one to amend the Bill of Costs and allowed it despite timeliness objection) (rev'd on other grounds, 481 F.2d 682 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974)). *See also* the so-called common fund cases discussed *infra*.

plications must be filed, the Fifth Circuit, in the absence of any contrary local rule,[5] found no bar to entertaining a fees request filed some two months after the entry of final judgment. Were we to follow the decision in *Knighton*, the present fees request and award would thus likely be timely even though filed some months after entry of final judgment. With all respect, however, we disagree with *Knighton*.

We start from the premise that a final judgment ordinarily signifies the final resolution, subject to appeal, of all claims raised in a lawsuit. *See* Fed. R. Civ. P. 54. New claims may thereafter be advanced and old ones reinstated only pursuant to rules providing, within narrowly defined circumstances, for the reopening of the judgment. *See, e.g.*, Fed. R. Civ. P. 59, 60. If this were not so, appellate tribunals would be constantly vexed by multiple appeals growing out of fragments of the same litigation, and a party could never be sure when his case had ended.[6] It follows that a prevailing party's claim for at-

[5] Although there is no local rule in the District of New Hampshire providing that motions for costs be filed within some specified time after entry of judgment, a number of district courts have adopted such rules. 10 Wright & Miller, Federal Practice and Procedure § 2679 at 240 n.76.

[6] Blackstone adds a bit of historical perspective to the practical considerations underlying the well-settled concept of finality of judgments. He tells how Edward I, "on his return from his French dominions in the seventeenth year of his reign" found it "necessary (or convenient, in order to replenish his exchequer)" to fine rather heavily various judges for "their corruption and other malpractices...." Paramount among these bad habits was the practice of "erasing and altering records," a practice apparently engaged in by "almost all of the king's justices, even the most able and upright." And these punishments were often of a sizeable amount. Sir Ralph Hengham, Chief Justice of the King's Bench is said to have been fined some 7,000 marks, a rather tidy sum considering that the Chief's annual salary was then only 60 marks. The threat of such punishment was clearly not lost on the bench, for as Blackstone relates: "The severity of which proceedings seems to have alarmed the succeeding judges, that through a fear of being said to do wrong,

torney's fees under section 1988 must be resolved before or in the final judgment unless that claim be regarded as falling within some special exception carved out by rule or practice.

Plaintiff urges two such exceptions upon us in support of the view that their failure to request fees prior to the entry of judgment or to move within 10 days to amend such judgment so as to include a fee award, is not fatal to their subsequent fee application. First plaintiff argues, as the Fifth Circuit held in *Knighton*, that section 1988 fees are properly treated as "costs," and thus specifically exempted from the requirement of resolution prior to the entry of final judgment.[7] This position is not without some support in the language of the Fees Act. The Act grants to the district court, in various specified actions, the discretion to "allow the prevailing party, other

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they hesitated at doing what was right. As it was hazardous to alter a record duly made up, even from compassionate motives...they resolved not to touch a record any more: but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question: and, because Britton had forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. ..." 3 Blackstone Commentaries, 409-410.

Thus from Edward's rather severe attempt to fill his coffers and the already traditional view of the solemnity of all judgments "came the ancient common law rule that a judgment, once enrolled on parchment, was unalterable even for the correction of a manifest mistake." *La Vale Plaza, Inc.* v. *R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967). Today, rules such as Fed. R. Civ. P. 54, 59 and 60 ease the situation somewhat, but the difficulties that would ensue were individual cases not to be organized around the principle of single and final judgment keep such escape valves the exception, not the rule.

[7] Notwithstanding plaintiff's reliance on the concept that attorney's fees are taxable as Rule 54 costs, plaintiff's motion for an award of attorney's fees was not made as part of a general application for costs; apparently, in fact, no such request for costs has yet been filed by plaintiff.

than the United States, a reasonable attorney's fee *as part of the costs*." 42 U.S.C. § 1988 (emphasis added). Focusing upon this language, the Fifth Circuit concluded in *Knighton* that, "Because Congress directed that attorney's fees under section 1988 be treated as costs, there is no jurisdictional time limit on the filing of a motion seeking such fees." *Knighton* v. *Watkins*, 616 F.2d 795, 798 (5th Cir. 1980) (footnote omitted). We are unpersuaded, however, by this analysis.[8]

We do not find it clear that Congress, by generally describing attorney's fees under section 1988 as a part of the costs, meant thereby to include those fees within the specific type of costs recoverable after judgment under Fed. R. Civ. P. 54. Rule 54(d), referring to the awarding of costs, provides, in part, that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs... Costs may be taxed by the clerk on one day's notice." 28 U.S.C. § 1920 adds a bit of flesh to the bones of Rule 54(d) by providing:

> "A judge or clerk of any court of the United States may tax as costs the following:

[8] Apart from the argument based on "costs," *see, infra*, the Fifth Circuit in *Knighton* pointed to little in support of its conclusion that motions for section 1988 fees may be filed after judgment has been entered and the 10 day period for amending or altering such judgment has expired. *See* Fed. R. Civ. P. 59(e). To say, as did that court, that a motion for fees does not change the judgment but merely seeks what is due because of the judgmmnt is to beg the question to be decided. Nor are the cases cited by the Fifth Circuit in *Knighton* compelling. *National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991, 994-95 n.3 (D.D.C. 1974), discussed the timeliness of a request for fees in the context of the so-called common fund situation, a situation which has long been distinguished from cases like the present. *See infra*. And, *Environmental Defense Fund, Inc.* v. *Froehlke*, 368 F. Supp. 231, 251-55 (W.D. Mo. 1973), while providing thorough background information on the history of and procedure for the awarding of costs, did not discuss the question of attorney's fees generally, let alone the specific question of the timeliness of a request for such.

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Examination of the above language strongly indicates that the costs allowed as of course by Rule 54(d) and detailed in 28 U.S.C. § 1920 are items of a nature very different from the discretionary attorney's fees allowed under the Fees Act. Rule 54(d) envisages the former as capable of being taxed by the clerk on one day's notice. In keeping with this idea the costs listed in section 1920 are almost all capable of routine computation, and the one arguable exception, item (6), is peculiarly within the court's own authority to establish, without input from the parties and with little likelihood of engendering controversy. Not so the discretionary award of attorney's fees under section 1988. To calculate such an award, indeed, even to determine whether one should be made at all, the district court must evaluate possibly a dozen diverse factors, *see King v. Greenblatt*, 560 F.2d 1024, 1026 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), including such factors as the novelty and difficulty of the legal questions presented and the skill required to perform the particular services provided. Moreover, in determining the propriety and size of a fee award, the district court is generally assisted by submissions

from the parties and frequently finds it necessary, as was true here, to hold a hearing on the matter. Appeals often ensue—leading to the prospect of separate fees appeals if final judgment rules are disregarded—as the sizeable sums involved may impose a very substantial and bitterly disputed liability upon the losing party. Hence while such fees, like routine costs, are, to be sure, somewhat ancillary to the main dispute, they are fully capable of engendering a major controverted claim which will be closely intertwined with the merits of the primary dispute and which will require careful factual and legal analysis by the court. The considerations making it feasible to treat routine costs as an exception to final judgment rules—the ease of their computation and the fact that they almost never give rise to dispute or appeal—plainly do not apply to section 1988 attorney's fees. Thus we do not believe that a section 1988 fees award can be likened to the costs assessed routinely after entry of judgment. The potential amount of the fees award, the varied factors which must be considered by the court in reaching the fees decision, and the crucial role of the judge and parties in reaching that final determination render the fees/costs comparison strained at best.

True, as plaintiff points out, the Supreme Court itself, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), citing the language of the Fees Act, characterized attorney's fees under section 1988 as being a part of "costs." But this statement was made in the context of rejecting the contention that the eleventh amendment stood as a bar to the awarding of fees against a state. The Court's general reasoning and ultimate conclusion that "Costs have traditionally been awarded without regard for the state's Eleventh Amendment immunity," *id.* at 695, hardly seems dispositive of the question whether section 1988 attorney's fees fall within the specific types of taxable costs contemplated by Fed. R. Civ. P. 54(d) and 58. *Cf. Roadway Express, Inc.* v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980) (costs that federal courts may impose on lawyers who unreasonably and vexatiously extend court proceedings do not include attorneys' fees under section 1988).

Plaintiff advances a second and alternative argument in support of his position that the resolution of a section 1988 fee request should be treated differently from the general run of controverted issues resolved within the contours of a court's final judgment. He suggests that his "claim for attorney's fees is a collateral and independent claim," and thus not controlled by the time limits which relate solely to the entry of judgment in the central but supposedly separate claim on the merits. Plaintiff would have us view the fee matter as a separate mini-lawsuit to be commenced, argued and resolved at some point in time following the entry of judgment in the central litigation. While plaintiff argues that this position finds support in the cases, the cited decisions involved circumstances of a different sort than those presented here. As discussed by Judge Friendly in *Fase* v. *Seafarers Welfare & Pension Plan*, 589 F.2d 112, 114-15 n.3 (2d Cir. 1978), "cases where attorneys seek, long after judgment, to be paid out of a fund created by the judgment, *Trustees* v. *Greenough*, 105 U.S. 527 (1882), *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885), or earmarked assets whose distribution would be governed by the legal principle which plaintiff's attorney had established, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939)...present a lesser problem than those where allowance of a fee will result in an addition to the amount awarded by judgment. Something may also turn on whether...the lawyer is asserting a right of his own...; in the latter type of case it is easier to characterize the proceeding as 'collateral' or 'independent.' " Here we have neither the so-called common fund situation, *see also National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991 (D.D.C. 1974), *rev'd on other grounds*, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977), nor an attorney seeking fees by asserting a right of his own rather than one of his client. *See* 42 U.S.C. § 1988 (award of attorney's fees goes to "prevailing party," rather than attorney). *But cf. Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (8th Cir. 1980).

Moreover, plaintiff's contention that a section 1988 fee request is an independent claim that can be maintained after judgment runs squarely counter to the language of the Fees Act itself, which provides that "*In any action or proceeding* to enforce [appropriate civil rights statutes]" the court may, in its discretion, allow reasonable attorney's fees to the prevailing party. (Emphasis added). This language strongly indicates that the fee issue is one properly viewed as belonging within the main body of the already commenced civil rights action.

We thus remain unpersuaded that a section 1988 fees request falls within some recognized exception—be it "costs" or a theory of independent claim—to the general rule requiring the resolution of controverted issues by a trial judge within the overall framework of the central litigation and the final judgment entered therein. Rather, our review of the relevant authority, *see, e.g.*, note 4, *supra*, including the Fees Act and the well-reasoned *Hirschkop* decision previously discussed, persuades us that the timeliness of a post-judgment motion for attorney's fees made pursuant to section 1988 is properly governed by Rule 59(e)'s ten day limitation.* A request for a discretionary award of fees under section 1988 is intimately tied to the questions raised in, and overall merits of, the prevailing party's case, *see King* v. *Greenblatt*, 560 F.2d at 1026-27; it is a request, moreover, that may lead to a sizeable and unpredictable addition to the burdens shouldered by the losing party, *see, e.g.*, *Palmigiano* v. *Garrahy*, 616 F.2d 598 (1st Cir. 1980) (affirming fee award of $115,483.75); *Lamphere* v. *Brown University*, 610 F.2d 46 (1st Cir. 1979) (award well in excess of $200,000). The ultimate award of fees is, in our view, clearly a part of the overall relief sought and granted during the course of a particular civil rights action. Not only will it often be more economical of a court's time to resolve fees requests prior to

*We need not now address the question whether and in what circumstances the time limits established in other Rules permitting the opening of judgments might apply to a section 1988 fees request.

entry of judgment rather than having them surface for the first time weeks or even months thereafter, but so doing ensures certainty as to the scope and finality of the judgment, *see Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363, 367 (E.D.N.Y. 1978), and at the same time reflects and re-enforces the strong policy against piecemeal appeals. *Wright* v. *Jackson*, 522 F.2d 935, 937 (4th Cir. 1975) (Aldrich, J.).

Indeed, the present case highlights many of the problems which would likely be frequently encountered were we not to endorse the position that Rule 59(e)'s ten day limitation marks, in terms of time, the outer limits of a fees request. The protraction here of a dispute previously, to all appearances, resolved is clearly not an occurrence to be encouraged. A court, having set its hand to the plow on the central litigation, should complete the furrow all at one time. The present post-judgment motion for an award, coming as it did nearly five months after judgment, was in our view too late.

We add that we see our decision as imposing no great hardship on civil rights litigants or courts. Doubtless persons such as the present litigants who have acted prior to this decision have greater cause for complaint than will those who follow them, but most fees litigants who have previously come to our attention have taken pains to request fees prior to or within ten days following entry of judgment, *see, e.g.*, *Ben David* v. *Travisono*, No. 79-1186, slip op. at 6 n.2 (1st Cir. May 16, 1980); the state of the law has surely been such as to suggest the wisdom of that course.

Our decision will not prevent a district court from granting prompt and effective relief in a civil rights case. Entry of judgment which determines all matters except fees and includes an express reservation of the issue of fees, is a possible option when time is of the essence. Such a judgment might raise a question of finality should an appeal immediately be taken, *see Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980), but even if non-appealable because still interlocutory the judgment would otherwise be effective. And the district court has the

means to ensure, when necessary, the appealability of such a judgment. Under Fed. R. Civ. P. 54(b) the court may direct the entry of final judgment forthwith upon fewer than all claims presented upon determining expressly that there is no just reason for delay. Thus under our present decision the district court retains ample flexibilty. Our decision merely ensures that fees, like all other matters in controversy, will be covered by a unified judgment which, absent express action under Rule 54(b), controls the entire case.

Nor in a consent decree context do we see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations. *Cf. Regalado* v. *Johnson*, 79 F.R.D. 447 (N.D. Ill. 1978) (expressing concern over the propriety of injecting the issue of fees into settlement negotiations). Failure to confront the fees issue merely muddies the waters, as the present case well demonstrates. We of course do not suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree. If agreement as to fees is not easily accomplished, the parties may provide for submission of the entire question of fees to the court; further, they may, of course, decide to waive fees altogether. But there is nothing whatever to be encouraged in the path followed here—leaving the matter of fees unmentioned in the settlement and then raising it unilaterally several months later under circumstances that cast a shadow upon the settlement itself. Where Congress has spoken on the subject of fees, there can be no virtue in pretending the issue does not exist.

As plaintiff's fees claim was filed out of time, it should not have been entertained, and we hold the district court was without jurisdiction to make any award.

The fees award entered by the district court is vacated.

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THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

Richard H. White, Et Al.

v. #C76-71

The State of New Hampshire
Department of Employment Security
Benjamin C. Adams, Commissioner

ORDER ON MOTION TO VACATE CONSENT DECREE

Motion denied.

So Ordered,

October 1, 1979

Martin F. Loughlin
U.S. District Judge

CC Michael M. Black, Esq.

Raymond J. Kelly, Esq.

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

RECEIVED
AUG 31 1979
NEW HAMPSHIRE
LEGAL ASSISTANCE
PUBLIC DEFENDERS

Richard H. White, et al.

v. HC 76-71

N.H. Department of
Employment Security, et al.

COURT's RULING ON MOTION FOR ATTORNEYS' FEES

This motion is brought under 42 U.S.C. §1988. The section provides that.

> In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title . . . the Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fees as part of the costs.

This case has a long history and the Court will not rehash in total the factual or chronological litany of events.

Briefly, the Attorneys for New Hampshire Legal Assistance saw the original plaintiff, Mr. White in 1975. Suit was initiated on his behalf in March, 1976. The case was heard before Judge Bownes and entailed a trial of two days. Subsequently, the case was appealed to the First Circuit. The delay in the appeal was due to the transcript not being ready for a period of six months. Upon checking the file, it is readily ascertainable that it is quite voluminous. There are over one hundred fifty entries.

There was a great amount of discovery in this case and William Barry, Magistrate was present at many discovery proceedings and he attempted to have counsel cooperate in facilitating and expediting this case through discovery procedures.

Counsel for the plaintiffs had to check Superior Court records in all ten counties in order to prepare their case as it was the defendant's position that files were privileged and could not be disclosed to plaintiff's counsel. As an aside, there is an average of three hundred appeals from determinations of the defendant's department to the New Hampshire Superior Court.

The parties attempted to arrive at a Consent Decree and there was evidence at the outset that attorney's fees and costs would be waived. These attempts proved nugatory and finally without any mention of attorneys' fees and costs a Consent Decree was filed and approved by Judge Devine on January 26, 1979.

At a hearing on August 21, 1979, defendant's counsel agreed that the time spent by plaintiff's counsel was accurate, but could not and did not agree as to the amount of legal fees requested in the sum of $18,554. Cross reference is made to itemized bill in interest of plaintiff's motion for attorneys' fees filed August 14, 1979, docket marking of 155.

Of this sum of money, Attorney Raymond J. Kelly is seeking to recover $15,303.25 and Attorney Alan J. Cronheim $3,250.75 reaching the heretofore mentioned total of $18,544.00.

Reference is also made to a memorandum dated June 20, 1979 from Chief Judge Frank Coffin. While this memorandum involves fee requests under 18 U.S.C. §30006A, it does state that the reasonableness of Attorneys' fees are to be decided by the District Court Judge. The reason the Court refers to this memo is that this particular Judge did not hear the case on its merits and is doing as well as he can by reviewing the file.

Reference is made to the case of Torres v. Sachs, 538 F. 2d 10 at page 13. Here the principal was stated that.

> allowable fees and expenses may not be reduced because (the prevailing party's) was employed . . . . by a civil rights organization . . . . or because the Attorney does not exact a fee.

Reference is also made to the case of Hoitt v. Vitek 495 F. 2d 219. This is a case from the First Circuit involving a suit against the Warden of the New Hampshire State Prison in violation of 42 U.S.Code §1983. The District Judge, Bownes, J. allowed fees to a private attorney, but denied fees to the New Hampshire Legal Assistance attorneys. At Page 221, there is strong dictum that if the plaintiffs had been represented solely by New Hampshire Legal Assistance, then their legal fees should have been granted. Quoting from said opinion at

> If the sole representative of the plaintiffs below had been NHLA and the district judge had reasoned, as he did, that the suit merited award under the "private attorney general" theory, we would find it difficult to discern the advancement of any legitimate policy by the denial of attorneys' fees to NHLA. See generally Note, Awards of Attorney's Fees to Legal Aid Offices, 87 Harv. L. Rev. 411 (1973).

Another issue raised by the defendants is that the Consent Decree does not make them "Prevailing Parties". In general parties may be considered to have prevailed when they vindicate rights through a Consent Judgment or without formally obtaining relief. See Nadeau v. Helgemoe, 581 F. 2d 275.

Defendant's counsel has called to the Court's attention a leading first circuit case on attorneys fees. King v. Greenblatt 560 F. 2d, 1024. This case involved an appeal from the award in attorney's fees resulting from a successful civil rights suit to improve conditions of plaintiff's confinement at a treatment center for the sexually dangerous, 42 U.S.C.A. S1988.

Quoting from pages 1026, 1027 and 1028 the Court set forth the criteria to be used.

What constitutes a reasonable attorney's fee in a particular case shall rest within the sound discretion of the district court, see Johnson v. Georgia Highway Express, Inc. 488 F.2d 714, 717 (5th Cir. 1974). We shall, however, expect a court to adhere carefully to certain general criteria in making a discretionary award under the Fees Act.

The Fifth Circuit's decision in Johnson v. Georgia Highway Express, Inc, supra, was cited with approval in the legislative history of the Fees Act and in decisions of the Eighth, Ninth, and D.C. Circuits. Johnson listed twelve factors to be considered by district courts in arriving at reasonable fees awards: 1) the time and labor required; 2) the novelty and difficulty of the question presented; 3) the skill required to perform legal services; 4)the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee in the community; 6) whether the fee is fixed or contingent; 7) time limitations imposed by client or circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation and ability of the attorne,. 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; 12) awards in similar cases. Id. at 717-19. These criteria are similar to those in the ABA Code of Professional Responsibility and we approve them for use in Fees Act cases within this circuit with the following observations.

As a starting point, the attorney or attorneys must submit to the court a detailed record of the time spent on the case and the duties performed. See Stanford Daily v.Zurcher, 64 F.R.D. 680, 682 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9 Cir. 1977). The court must secure from the attorneys a full and specific accounting for their time; bills which simply list a certain number of hours and lack such important specifics as dates and the nature of the work performed

during the hour or hours in question should be refused. Furthermore, "an attorney's record of time is not a talisman", Rainey v. Jackson State College, 551 F.2d 672, 677 (5th Cir. 1977); the district court should scrutinize it with care.

> "The trial judge should weigh the hours claimed against his own knowledge, experience and expertise of the time required to complete similar activities. If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a laywer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." Johnson v. Georgia Highway Express, Inc., supra, 488 F.2d at 717.

Once the time and labor required have been fully evaluated, the district court should apply the relevant Johnson criteria in arriving at a reasonable fee. In so doing, it would be helpful for the court to set out in the record the basis for the award and any pertinent findings of fact. See e.g., Stanford Daily v. Zurcher, Supra. Care obviously should be taken to avoid excessive fees. The "normal" per hour rate in a locale is itself an artifical construct. Actual bills will frequently be lower, sometimes much lower, than that rate might indicate; on exceptional occasions they may however exceed it. While the modest Criminal Justice Act rates might allow a more mechanical application, an assumed market place rate is never to be applied across the board without regard to the difficulty of the work, the results achieved and all other relevant factors.

As stated before, this Court did not have the benefit of sitting as the Trial Judge, neither was the Court privy to conferences that the Magistrate participated in.

First of all, the Court rules that the plaintiff is entitled to attorney's fees.

The second issue is whether the requested amount is reasonable as set forth in the criteria enunciated in King v. Greenblatt, supra. As stated the trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities. Further the court should set out in the record the basis for the award and any pertinent findings of fact.

At the outset, it is readily apparent that the file is voluminous.

It is subdivided into separate folders, entitled Motions, Pleadings, Orders, Depositions, Correspondence, Interrogatories and Memoranda. It is approximately three and a half inches in depth.

Docket entries as of today's date exceed 155 entries.

The issue was the finding of the District Court (Bownes, J.) that there was an unlawful delay by the defendants in processing claims for unemployment compensation. This was on November 15, 1977 and December 15, 1977. As stated, an appeal was taken to the First Circuit Court of Appeals, there was a remand on defendant's motion and a Consent Decree filed in this Court.

Reference is made to plaintiff's itemized bill in support of plaintiff's motion for attorney's fees. (Docket Entry 155)

Attorney Raymond J. Kelly alleges that he spent 312.5 hours non-court time and 22.45 hours court time.

His associate, Alan J. Cronheim alleges that he spent 79.05 hours non-court time and 12.10 hours court time.

Attorney Kelly seeks compensation at the rate of $45.00 per hour for non-court time and $55.00 per hour for court time. Attorney Cronheim at the rate of $35.00 per hour non-court time and $40.00 per hour court time.

The Court does not intend, nor does it deem to be the dictate of King v. Greenblatt supra, to go through each pleading, every piece of correspondence, etc. to arrive at its ultimate conclusion of reasonable attorney's fees, but will allude to certain sections of the file. For example, plaintiff's summaries of evidence, 359 pages of transcript from the trial, defendant's summary sheets, plaintiff's 28 page pretrial memorandum of law, Discovery in the case, numerous motions to dismiss, conferences of counsel, conferences and hearings with Barry, Magistrate, depositions of Roland L. Demers, Albin R. Lane and Rodney P. Anderson, court orders, interrogatories, affidavits in support of class actions and numerous objections by counsel.

It is also evident from the file that although the case eventually was settled by a consent decree, that it was bitterly contested from May 24, 1976 until today.

The Court does not question and defendant's counsel has not produced any evidence to contradict the hours spent on this case by Attorneys Kelly and Cronheim.

Plaintiff's counsel are very competent. The Court,in State cases,has had Attorney Kelly appear before him in particular on cases and Attorney Cronheim on occasion. Without reflection on counsel, but considering the length of time they have practiced law and using the Court's experience and the shibboleths of the New Hampshire Federal and State Bar Association criteria, work involved and results obtained, the Court awards reasonable attorney's fees as follows.

For hours spent by Attorney Kelly at the rate of $40.00 per hour for non-court time and $50.00 per hour for court time or a total of $13,636.07.

For hours spent by Attorney Cronheim at the rate of $30.00 per hour non-court time and $35.00 per hour for court time or a total of $2,998.33.

Reasonable attorney's fees in the sum of $16,644.40 are awarded to Plaintiff's counsel.

Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

August 30, 1979

cc Michael M. Black, Esq.
Raymond J. Kelly, Esq.
Alan Cronheim, Esq.

NO. 80-5887

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD H. WHITE,

Petitioner,

-v-

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, et al.,

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

Upon the attached affidavit, petitioner RICHARD H. WHITE respectfully moves this Court pursuant to Rule 46 of the Rules of this Court for an order permitting petitioner to proceed before this Court in forma pauperis. Leave to proceed in forma pauperis was sought and granted below by the U.S. District Court for the District of New Hampshire.

Dated: New York, New York
December 10, 1980

Respectfully submitted,

E. RICHARD LARSON
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
212/944-9800

Counsel of Record

NO. 80-5887

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Respondents.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, RICHARD H. WHITE being first duly sworm, depose and say that I am the PETITIONER, in the above-entitled case; that in support of my motion to proceed before this Court without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present to this Court are the following:

CAN RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE, WHICH ALLOWS 10 DAYS FOR THE FILING OF A MOTION TO ALTER OR AMEND A JUDGMENT ON THE MERITS, BE USED TO BAR AN APPLICATION FOR ATTORNEYS' FEES IN THE FACE OF THIS COURT'S DECISION IN SPRAGUE V. TICONIC NATIONAL BANK, 307 U.S. 161, 170 (1939), HOLDING THAT A FEE APPLICATION IS "NOT A REQUEST FOR A MODIFICATION OF THE ORIGINAL DECREE," AND IN SPITE OF THE FACT THAT THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 DEFINES FEES "AS A PART OF THE COSTS"?

MAY A COURT REQUIRE COUNSEL TO NEGOTIATE A FEE AWARD CONCURRENTLY WITH NEGOTIATIONS DIRECTED AT SETTLING THE MERITS OF A CASE, REGARDLESS OF THE LEGAL AND ETHICAL CONFLICTS THAT SUCH A RULE IMPOSES UPON CLASS COUNSEL?

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

YES, PART-TIME, 25-30 HOURS PER WEEK.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

I AM PAID $3.10 PER HOUR (MINIMUM WAGE), EARNING BETWEEN $310 AND $372 PER MONTH. MY EMPLOYER IS FAIRFIELD MOTORS, KEENE, NEW HAMPSHIRE.

b. If the answer is no, state the date of your last employment and the amount of the salary wages per month which you received.

NOT APPLICABLE.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

NO.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

NOT APPLICABLE.

3. Do you own any cash or checking or savings account?

YES.

a. If the answer is yes, state the total value of the items owned.

CHECKING ACCOUNT ONLY: APPROXIMATELY $100.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

YES.

a. If the answer is yes, describe the property and state its approximate value.

1972 AUTOMOBILE WORTH MAYBE $500.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NORMA WHITE, MY WIFE.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Richard H. White

RICHARD H. WHITE

SUBSCRIBED AND SWORN TO before me this 19 day of November, 1980.

Cynthia Y Conway

NOTARY PUBLIC